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6 Attorney for Debtor
7 Ophelia Alvarez

8 UNITED STATES BANKRUPTCY COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11 In re:) Case No.:15-30180
12) Chapter 13
13 Ophelia Alvarez)
14)
15) EX PARTE MOTION TO RECONSIDER
16) DISMISSAL OF CASE
17 Debtor.)
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1. This case was dismissed, orally, at hearing on August 21, 2019 at 1:10 P.M. A written order followed the same day, docket item no. 36.

2. David Burchard appeared on his behalf as the Chapter 13 Trustee at that hearing. I appeared on behalf of the debtor.

3. Mr. Burchard requested dismissal of the case based on the following items to my recollection:

- a. Failure to notify creditors of bankruptcy
- b. Failure to notify previously omitted creditors
- c. Lack of amended plan

1 d. Lack of collateral description in Schedule D
2 e. I do not remember if he brought up payment issues,
3 but he generally has in cases where the debtor is
4 behind.

5 f. Implicitly, he was also arguing for dismissal by his
6 written motion to dismiss filed before the July
7 hearing which included other items beyond what is
8 mentioned above.

9 4. The court had to have been left with an impression
10 that there had been little or no progress on the case, and that
11 there was little or no advocacy by me on my client's behalf
12 since this case was called the prior month.

13 5. Mr. Burchard did not request dismissal of the case in
14 July, and I accepted the criticism over last-minute fixes and
15 filings that month on behalf of my client and my limited
16 availability in early July around the holiday.

17 6. The prosecution of the case since July, however, has
18 been very active and both my client and I have been making our
19 best efforts to prosecute the case. As mentioned above, the
20 Court was left with the impression that there had been almost no
21 actual progress or anything done on this case since July; that
22 it had simply languished.

23 7. In fact, I have been regularly communicating with Mr.
24 Burchard's attorney, Brisa Ramirez.

25 8. Ms. Ramirez and I had e-mail exchanges specifically on
26 this case on: August 7th, August 8th, August 16th, and August 20th.
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1 9. The subject of those e-mails was the progress of this
2 case, or substantive and technical issues about this case.

3 10. **Critically, in the August 7th and August 16th e-mail**
4 **exchanges, Ms. Ramirez said another problem with our plan on**
5 **file was that Mr. Burchard objected to the proposal to sell the**
6 **house. She informed me that he wanted the house sold in 6**
7 **months from the filing date, which is actually only about one**
8 **month away. (The case was filed on March 25th.)**

9 11. There would be major logistical problems with selling
10 the house so soon that would result in a poor outcome for my
11 client and fail to maximize the value of the estate. There
12 would also arguably be no point in trying to confirm the case if
13 it provides for an immediate sale and was not confirmable in
14 August.

15 12. Accordingly, after further discussion with the client
16 and attempts to get her to address a problem over missed post-
17 petition mortgage payments that was preventing the case from
18 going forward, I suggested to Mr. Ramirez that we compromise and
19 give the debtor until February 2020 to sell the property. I
20 made this compromise offer five days before the hearing, on
21 August 16th. She wrote me back that day and said she would ask
22 Mr. Burchard. At the time of the hearing, I had not heard back
23 on this proposal.

24 13. I also wrote Ms. Ramirez on August 16th that I had
25 uploaded a certificate of service that showed a number of
26 documents were served on July 16th. I missed the reply email
27 from my vendor in July, so that is why I took specific remedial
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1 action to write Ms. Ramirez once it got uploaded the week before
2 the motion to dismiss hearing.

3 14. The certificate of service was the proof that all the
4 notice and omitted creditor issues were fixed.

5 15. A review of the certificate of service clearly shows
6 that the omitted creditors were in fact served with the notice
7 of bankruptcy; that the amended plan was served on all creditors
8 with notice and opportunity to object, and the omitted creditors
9 had been added to the service list/creditor matrix. These
10 items had been fixed over a month before the hearing; the proof
11 was filed the week before the hearing. I believe Mr. Burchard
12 was not aware of this, and this would have made him think the
13 case was being neglected.

14 16. I also had prepared a short document that updated the
15 status of the case the prior week. It was an attempt to narrow
16 down issues that I could refer to at the hearing since it was
17 not clear from the docket what was happening and that we were
18 working on the case. I wanted to summarize where the case stood
19 since there were a lot of issues in July, and I thought my
20 client was an underdog due to payment issues. I sent that
21 document to Ms. Ramirez Monday night and also filed it.

22 17. Other issues, to the best of my recollection over what
23 was said at the hearing, that apparently were basis for the
24 dismissal, were the lack of an updated schedule with collateral
25 description and an amended plan.

26 18. As noted above, I was waiting to hear back from Mr.
27 Burchard's office on my proposed plan compromise on the date of
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1 the sale of the property. That is why there was no amended
2 plan.

3 19. Valuation of the car had been dropped; it had been an
4 issue on the motion to dismiss because the plan on file
5 reflected valuation of the Honda. This issue was dropped first
6 because Ms. Alvarez said she had a co-signer (this is unclear
7 from the POC); more importantly, she does not drive the car and
8 wants to surrender it now- she is certain.

9 20. It was my intention to have Ms. Alvarez sign the new
10 plan after a compromise with the Trustee was reached, and
11 approve the minor schedule amendment to describe collateral and
12 an amended schedules declaration the same day. I do not think
13 the trustee would consider this particular issue (collateral
14 description) major.

15 21. The other outstanding issues, which I summarized in my
16 emailed statement to Ms. Ramirez were the problems over plan
17 payments and mortgage payments, or the declaration that relied
18 on the mortgage payments being made.

19 22. My client and I are aware those are important issues.
20 The client had, in fact, filed a direct payments declaration
21 that admitted not all payments had been made last month (I am
22 unsure but the court may have asked whether this had happened at
23 the hearing or been under the impression none was filed. This
24 happened in mid-July and clearly should not have been an issue
25 re filing the document). No amendment to this declaratoin was
26 filed because the missed payment was still not fixed - Ms.

1 Alvarez maintained until last week that the lender continued to
2 tell her she was post-petition current.

3 23. I feel confident the court thought that this case was
4 failing based on advocacy and no-prosecution issues and not
5 payment issues, and I do not believe there was any real
6 discussion of Ms. Alvarez's missed payments during the hearing
7 as a basis for dismissal.

8 24. If the payments were not the basis of the dismissal, I
9 would submit that this case should not have been dismissed
10 because it was being prosecuted.

11 25. Additionally, on the day of the hearing my client
12 informed me that she had made a payment to bring the payments to
13 the trustee current. She forwarded me the TFS email which I
14 have since sent to Ms. Ramirez recently. (The payment was
15 canceled after the case was dismissed but could be immediately
16 reinstated if the court grants this motion.)

17 26. This case is a 100% plan, and my client has paid in a
18 lot of money to the trustee and shown up for a 341 to identify
19 herself. She has been less hard to reach recently, and I
20 believe she can cooperate with everything and the case will turn
21 on payments as the only issue if reinstated.

22 27. I have submitted a very large amount of additional
23 information that I was prosecuting this case on my client's
24 behalf, and that there were substantive negotiations going on
25 behind the scenes, through the ordinary and appropriate channel,
26 over the sale of the house, which perhaps was the single most
27 critical issue in the case.

1 28. My client and I take responsibility for filing the
2 amended documents late in July before that hearing, and I also
3 take responsibility for uploading a certificate of service five
4 days before this hearing when I could have uploaded it sooner.
5 I did remedy this though by reaching out to my counterparty the
6 week before the hearing.

7 29. I certainly do not think there was any attempt at
8 "gotcha" litigation by Mr. Burchard's office, but I do think the
9 record suggests the Trustee was probably not aware of the
10 primacy of the sale date negotiations to the amended plan, or
11 that we remedied the notice and service issues and did not
12 intend to value the car in our next plan.

13 30. A remaining issue: there was an objection to
14 confirmation by the lender. While I did write the lender's
15 attorney asking that they withdraw the objection based on the
16 mid-July plan amendments before the hearing, I was aware that I
17 was going to be amending the plan again primarily over the sale
18 date based on negotiations with the trustee. In addition, I was
19 contemplating having to reduce the initial plan payments down
20 since my client was behind and needed money for the mortgage
21 payments holding up the 341, which would have created a new
22 problem potentially with the lender's expectation for certain
23 fixed payments. In short, I did not think there was any
24 realistic chance of making progress on that creditor objection
25 until the new plan was ready, after the trustee and I reached an
26 agreement on a sale date.

1 31. As a practical matter, with her home in foreclosure
2 Ms. Alvarez will have no choice but to file another Chapter 13
3 bankruptcy to prevent it from being foreclosed. This case
4 essentially presents the question of whether we want to let it
5 move forward, or start it over from the beginning. I would
6 submit that it would be more efficient to let this case move on.
7 The debtor has considerable difficulty producing proof of income
8 and other documents and will have to re-enter that process.
9 Creditors will have to file new claims and new objections to
10 confirmation. Reinstating this case will probably put Ms.
11 Alvarez on a faster track to selling the property than putting
12 her in the position to start over. She would like to do so,
13 however, due to the uncertain outcome of motion practice in a
14 hypothetical future case. Notably, this case or a future case
15 would be 100% plans.

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17 Requested Relief

18 The reasonable remedy is for the dismissal to be vacated
19 and for the automatic stay to be deemed in place. The case
20 should be calendared for a hearing next month or October on the
21 regular 1:10 p.m. calendar. At that hearing, my client should
22 be prepared to show, at minimum, that she has filed a plan with
23 a new property sale date, that the case is entirely current, and
24 that she made progress on having the creditor objection resolved
25 or will set it for a hearing on the next available confirmation
26 calendar.
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1 7. From my perspective, those issues were not the basis of
2 the dismissal though, but perceived lack of prosecution
3 of the case.

4 8. I understand this may seem too convenient that there is
5 an explanation for why every document was not filed. I
6 do, however, believe I have straightforward proof of all
7 the work that was being done that I said was being done.
8 In addition, I believe that ordinarily, I would have had
9 an opportunity to present this information to the Court.

10 9. I am not critical of Mr. Burchard's office. Instead, I
11 believe that ordinarily, I would have been able to
12 explain, particularly, that I was in regular contact
13 with his attorney and we were discussing the property
14 sale date and how the notice issues were fixed in July.

15 10. A misunderstanding, combined with an overall tense
16 environment probably informed by a prior hearing and the
17 fact the docket and Mr. Burchard's notes simply did not
18 reflect all the work that was being done and had been
19 done, made that impossible.

20 11. I do not know, but think it is certainly possible that
21 the trustee would have agreed to give my client until
22 the catch-up date to be current, or for an amended plan
23 by then to bring her current if he was fully aware of
24 our progress as described above. Once we reached a
25 compromise on the sale date, the amended plan and
26 related documents could have been ready by the end of
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the month or sooner. The creditor objection could have then been set for a hearing.

As to the factual assertions above, I swear under penalty of perjury that they are true. Any assertions made to the best of my memory or recollection are true to the best of my belief.

August 29, 2019

/s/ Jason Honaker